Judicial Oaths and their Effect Upon the Competency of Witnesses

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Reprint of paper read before the
PENNSYLVANIA BAR ASSOCIATION
June 30, 1903

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JUDICIAL OATHS AND THEIR EFFECT UPON THE COMPETENCY OF WITNESSES

An oath consists of an appeal to a supernatural being to witness the truth of one's words and an imprecation of the vengeance of that being if the swearer commits perjury. Its obligation is derived from a supposition or belief on the part of the witness that, by virtue of having subscribed to the ceremony, some dreadful fate will be inflicted upon him if there is any deviation from the truth.

The custom of giving and demanding oaths in confirmation of promises or assertions has existed from a time "whereof the memory of man runneth not to the contrary." It originated before the beginning of human records, when man's idea of divinity centred about anything in nature more powerful than himself or which he could not understand. Among primitive peoples we still find survivals of oaths sworn in the names of savage beasts. In Russia the Ostyaks to this day swear by the wild boar and in India the Santals swear by the tiger. Each believes that should he fail to keep his oath the beast which he has affronted by his perjury will in due time seek him out and devour him. In New Guinea the natives still swear by the mountains, and a perjurer, they believe, will meet his fate beneath the debris of an avalanche hurled upon him by the outraged deity.

Among the very oldest written records we find references to the oath which prove it to have been at that time an ancient custom. When Abraham left Ur of the Chaldees, the land of his nativity and pitched his tent in Mamre, he went out to battle against Amraphael King of Shinar and his associates. After he had prevailed against them his ally the King of Sodom desired him to share the spoil, but Abraham replied "I have lift up my hand unto the Lord, the

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most high God, the possessor of heaven and earth; that I will not take from a thread even to a shoe latchet, and that I will not take anything that is thine, lest thou shouldst say I have made Abram rich" (Genesis, XIV 22-23).

Amraphael, King of Shinar, we now know to be the same as Hammurabi, King of Babylonia, who lived two thousand two hundred and fifty years before Christ. The magnificent work of the French scientists has thrown the light of intelligent research upon that dim period and has revealed to us many of the secrets of Babylon, "that great city"; secrets which seemed safely hidden under the accumulations of the centuries.

The French expedition in excavating at Susa in Elam, uncovered a huge block of black diorite. Upon its surface was written Hammurabi's code of laws. This stone was one of many such which that great king set up in different cities of his dominions. It was carried off from Sippara in Babylonia by an Elamite king and was taken by him to grace his triumph at Susa. There it remained, forgotten, while a hundred generations of men sprang up and were received again into the bosom of the earth, but still retaining graven in its unyielding surface the laws by which justice was administered in that ancient period. Among these laws, which were old when Moses fled from the hand of Pharaoh, we find not less than twelve instances where oaths were required as a part of the procedure of the courts.

It is obvious that the efficacy of the oath depends entirely upon the mental attitude of the swearer. If he is compelled to faithfully perform a ceremony which he believes will call down upon him the vengeance of an all powerful being for falsehood, he will probably tell the truth. Therefore, each person must swear by the god in whom he believes. This was early recognized. After Abraham had left Mamre and had taken up his abode in the land of Gerar, Abimelech who was a heathen came to him and said "God is with thee in all that thou doest. Now therefore swear

unto me here by God that thou wilt not deal falsely with me nor with my son nor with my son's son, but according to the kindness I have done unto thee, thou shalt do unto me and to the land wherein thou hast sojourned. And Abraham said I will swear" (Genesis XXI, 22-24). Baron Puffendorf (Chap. on "Oaths") states it as a rule of law that each person must be sworn according to the ceremonies of his own religion.

The use of the oath in courts of law began very early. Among the Jews the decisory oath was used long before the beginning of the christian era. This is an oath which may be tendered by one party to another or by the judge to either, and upon the acceptance or refusal of it the decision of the case depends. It is not ordinarily resorted to save in the absence of witnesses. We find a distinct reference to it in the second book of Moses. "If a man deliver unto his neighbor an ass, or an ox, or a sheep, or any beast to keep; and it die, or be hurt, or driven away, no man seeing it; then shall an oath of the Lord be between them both, that he hath not put his hand unto his neighbor's goods; and the owner of it shall accept thereof and he shall not make it good" (Ex. XXII, 10, 11; see also Hebrews VI, 16). The same kind of an oath is shown to be a part of Jewish law by the Talmud (Rodkinson's Babylonian Talmud, Vol. 7 and 8, p. 68, Vol. 9 and 10 "Tract Shebuoth"). Among the Jews no oaths appear to have been required of witnesses in criminal cases. They were solemnly warned of the sin of lying and were rigidly cross-examined, but not sworn. (Mendelsohn's Crim. Jur. of Ancient Hebrews, p. 120.) In civil cases, however, witnesses were sworn sometimes, although not always. (Rodkinson's Babylonian Talmud, Vol. 9 and 10, Tract Shebuoth.)

In the code of Hammurabi there are eleven instances where the decisory oath is required and one where clearly an oath is required of witnesses. It is there provided as follows: "If a man who has lost something of his, something

of his that is lost has been seized, has said, A giver gave it to me, or I bought it before witnesses, and the owner of the thing that is lost has said, Verily, I will bring witnesses before whom he bought it, and the owner of the lost property has brought the witnesses who know his lost property, the judge shall see their depositions, the witnesses before whom the purchase was made, and the witnesses knowing the lost property shall say out before God what they know; and if the giver has acted the thief he shall be put to death, the owner of the lost property shall take his lost property, the buyer shall take the money he paid from the house of the giver" (John's Translation, Sec. 9).

The oath in judicial proceedings of the early Roman law was used as a method of deciding the case, but was not required of witnesses. It was strictly an alternative to evidence, it was never used to add weight to it. (See Greenidge's "The Legal Procedure of Cicero's time," p. 259, *et seq.;* Hunter's Roman Law, p. 1005, *et seq.;* Roby's Roman Private Law, p. 394, *et seq.*) About the time of Constantine, however, the practice of swearing witnesses originated, (Hunter, p. 1060), and from that time forth formed a part of the Roman and subsequently of the Civil Law procedure.

Whether the oath was introduced into England by the Civil Law or whether it grew up indigenously with the Common Law, we do not know. All that is certain is that so far back as the light of modern research has extended we have found it playing a very important part in common law procedure. It was from the very earliest times, required of jurors and witnesses and was extensively used in connection with various modes of trial, *e. g.,* by battle, by the ordeal, by wager of law, etc.

Christianity having been introduced into England about 500 A. D., and having quickly become the state religion, the oaths thereafter used in the procedure of English courts were naturally oaths sworn in the name of the christian God. Britton (p. 135) says "Jurors shall be sworn 'so help me

God and the Saints' " and "it was provided on account of people difficult of belief that oaths should be taken upon the Holy Gospels of God for avoidance of adolatry." In the year books as early as 1293, we find a form of oath ending "So help me God and the Saints" (20 and 21 Edw. I, A. D. 1293, p. 440).

The supposed additional bond of the oath will be laid upon the soul of the witness if he believes that the god in whose name he swears will punish him for perjury. It is not necessary that he shall believe in any particular deity. The one who administers and the one who takes the oath need not be of the same religion. The judge may be fully persuaded that the god in whose name the witness swears is a false god, yet if the witness believes and fears him the same result is attained as if a christian swears by the true God.

Curiously enough, however, we find it stated by the older English commentators, Bracton, Fleta, Britton and Lord Coke that none but christians were competent to take oath and hence none others could be witnesses. Coke, who seems to have been very bigoted, even went so far as to exclude papists and excommunicated persons. In Attorney General *vs.* Griffith (2 Bulstrode, 155), he declared "Every recusant convict is to be excommunicated; and therefore in my circuit, I do not admit them for witnesses between party and party, they being no competent witnesses." He said further, addressing himself to some popish recusants who were then before him, "the writ was used *de Leproso Amovendo,* for fear of infecting of the body and such writs are now very requisite to remove you, for you infect the soul which is much more dangerous." Jeremy Bentham in commenting on the rule excluding excommunicated persons says, "No sooner are you excommunicated than a discovery is made, that 'being excluded out of the church' you 'are not under the influence of any religion.' You are a sort of atheist. To your own weak reason it appears to you that

you believe; but the law which is the perfection of reason, knows that you do not. Being omniscient and infallible and so forth, she knows that were you to be heard it would be impossible you should speak true" (Bentham's Judicial Evidence, Vol. V, p. 140).

These rules were the result of mere religious bigotry—of the assumption that all heathens were necessarily most infamous persons. They were founded upon a total misconception of the true nature of an oath, quite as much so as was the case with one Pastor Hapke, who recently refused to be sworn in a Berlin court until he knew whether the judge was a christian. As no evidence on that point was produced (presumably being ruled out by the court) the pastor still declined to be sworn and was fined 300 marks (17 Irish Law Times, 69).

Strange to say no reported case squarely raised the question of the competency of non-christians until the year 1744. Jews had been allowed to testify (Barker *vs.* Warren, 2 Mod., 271, Anonymous, I Vern., 263; Serra *vs.* Munez, 2 Str., 821; Robely *vs.* Langston, 1 Keb., 314), but their competency had not been seriously questioned. In the year mentioned, however, the great case of Omychund *vs.* Barker (Willes, 538; I Atk., 21), was decided.

It arose between an English and an Indian merchant. Two persons professing the gentoo religion were offered as witnesses. They were objected to on the ground that they believed in a false god and practiced disgusting religious rites. The case was elaborately argued and the authority of the older commentators definitely overthrown by the decision. Lord Chief Justice Willes remarked that Coke's notions were "contrary to religion, common sense and common humanity" and that the devils themselves "could not have suggested anything worse." He said he ignored the authority of Fleta and Britton because they lived in popish times, when no trade was carried on but the trade of religion and that he for one hoped such times would never

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The enclosed pamphlet is forwarded as indicating the present law with regard to the exclusion of witnesses on the ground of religious unbelief, and the need for new legislation in Pennsylvania. Attention is also called to the fact that those who have conscientious scruples about administering oaths are rendered ineligible for certain judicial and magisterial positions. A bill to abolish all religious tests and to modify the use of oaths, thereby reverting to the original custom of the colony of Pennsylvania, as established by William Penn, will be introduced at the next session of the Legislature.

It is requested that the matter be given careful attention and the bill be supported by as many as can honestly give it their approval.

On behalf of a number of Friends and others,

ISAAC SHARPLESS
President of Haverford College

come again. It was decided that any person who believes in a god who will punish him for false swearing either in this world or in the next, may be admitted as a witness, sworn according to the ceremonies of his own religion; but that atheists or unbelievers cannot be admitted because they are incompetent to take an oath which can have no binding force upon them. It was also said that christian witnesses should be given more credit than heathens because the former, since they believe in the true God, are less likely to speak falsely.

This is the rule to-day wherever the common law prevails. It has, however, been abolished in England by a series of statutes culminating in 51 and 52 Victoria (C., 46), which expressly makes unbelievers competent. The same is true of India and some provinces in Canada (II Anglo-Indian Codes, C. IX, p. 118; Practical Stats. [Canada], p. 78). In the United States the disqualification arising from lack of religious belief has been abolished in thirty-three and probably in thirty-six States and territories; but in fifteen, of which I am sorry to say Pennsylvania is one, the common law rule is still in force.

It has recently been suggested that the evidence act of 1887 (P. L., 158) may perhaps admit atheists and agnostics as witnesses in Pennsylvania. I should be glad if this were the case, but I am unable to agree.

1. We have a number of cases which fully establish the common law rule excluding all who do not believe in a god who will punish for false swearing (Quinn *vs.* Crowell, 4 Whart., 334; Cubbison *vs.* McCreary, 2 W. & S., 262; McFadden *vs.* Com., 23 Pa., 12; Blair *vs.* Seaver, 26 Pa., 274; Com. *vs.* Winnemore, 2 Brewst., 378).

2. The language of the act as to criminal cases is "except (certain cases enumerated in this act) all persons shall be fully competent witnesses in any criminal proceeding before any tribunal" and as to civil cases. "No * * *

interest or policy of law except as is provided in section 5 of this act shall make any person incompetent as a witness." No exception of persons lacking religious belief is made.

These words may be construed in one of two ways.

First.—They may be construed literally to admit all persons not expressly excluded.

Second.—They may be construed to destroy certain disabilities only, at which the act was obviously aimed, and among which religious unbelief was admittedly not included.

If we adopt the first construction, the act removes not only incompetency arising from interest, the commission of crime, etc., but also that arising from incapacity. At common law the test of capacity is whether the witness is competent to take an oath. This competency consists of two features (1) understanding and (2) belief. If either is lacking the witness must be excluded. Now it is quite plain that if we construe the act of '87 to destroy incompetency arising from unbelief it must also destroy that arising from lack of understanding, in which case not only atheists and agnostics but infants and lunatics are competent witnesses. It will not do to adopt one construction as to atheists whom we may be willing to admit and quite another as to lunatics and young children whom we are obliged to exclude.

It seems clear therefore that this construction of the act of '87 is inadmissible. It would lead to an absurd result which the law abhors. Consequently we must adopt the second construction in which case atheists are still incompetent.

As to civil cases it may be further remarked that the phrase "Interest or policy of law," is the same as the one used in the act of '69, and the words have already received a judicial construction foreign to the assumption that they destroy grounds of incompetency not specifically dealt with by the terms of the act. In Tioga County *vs.* South Creek

Township (75 Pa., 433), they were decided not to destroy a wife's incompetency to testify against her husband in certain cases. The same point was decided in Jane's Estate (147 Pa., 527) since the late act. (See also Harrisburg *vs.* Rhoads, 89 Pa., 353; Karns *vs.* Tanner, 66 Pa., 297.) Finally there is a decision since the act of '69 which holds that unbelievers in civil cases are still incompetent (Lucas *vs.* Piper, 40 L. I. 5, Briggs, *J.*).

If we suggest the propriety of a change in the law, the burden is upon us to show either that the common law rule is founded upon a misconception, or that it has outlived its usefulness. The common law theory is that no man should be admitted as a witness unless he takes an oath because otherwise there is no security that he will tell the truth. If he has no belief in any god he is incompetent to take an oath and hence must be excluded. The real reason for his exclusion is not to punish him for being an atheist but because the law assumes that, not being under the fear of the vengeance of God for perjury, he will not tell the truth.

Let us see whether this is a reasonable assumption. There are several elements which combine to lead a witness to tell the truth. In the first place it is *easier* to do so, for in that case the memory only is used, whereas in concocting fabrications, both memory and creative imagination must be brought into play. Then fear of disgrace, the dictates of moral honor, regard for the rights of others and, in the case of religious persons, the teachings of their religion, all tend to elicit a true recital. On the other hand there may be (although not necessarily so) influences which lead the other way—motives of interest, fear, love, hate, sympathy, etc. The common law accentuates the influences tending toward truth telling by threatening temporal punishment for perjury and by requiring the witness to take an oath, which is supposed to lay his soul under an additional bond. All of these influences affect equally atheists and believers except the one of religious sanction only.

I think it is fair to say that the personality of the witness, his character, moral training and education have far more to do with his veracity than the question of belief only. The common law assumption that atheists are infamous persons incapable of telling the truth, is of course entirely false. Some of the best known thinkers of all time would at common law be incapable to be witnesses. To say that such men as Darwin, Huxley, Tyndal, Franklin, Jefferson and a number of others who, perhaps, could not avow a belief in God, were entirely unworthy of credit, is mere nonsense.

The essential absurdity of the rule, however, is better shown by the way in which it works in practice. It entirely fails to do that which it intends, and excludes unbelievers only under circumstances which belie and disprove the assumption that their word is unreliable. A man's belief or disbelief in the existence of a god who will punish him for false swearing is a psychological fact—it is a state or condition of his mind. How shall we discover what that condition is? There is only one human being who can possibly know, viz: the man himself. If we impeach him for unbelief we must show that he has himself disclosed the fact that he does not believe. There are two methods by which this may be done. First, produce witnesses who in the past have heard the suspected atheist declare his disbelief in God. Second, interrogate the man himself on his *voir dire*.

Evidence of the first kind is unsatisfactory and indeed seems wholly irrelevant. It is unsatisfactory because, at best, it is but hearsay, declarations which cannot be said to be against interest, made not upon a judicial occasion but perhaps during a frivolous and loose conversation. Thus in McFadden *vs.* Conn. (23 Pa., 12), the evidence was that the man whose religious belief was questioned, had, on a previous occasion "in quarreling with his fellow-jurors," said that he "did not care for the bible any more than for a spelling book," and that he was "a Tom. Paine man and would as lief swear on a spelling book as on a bible." In Brock *vs.*

Milligan (10 Ohio, 121) it was testified that the witness had in a casual conversation about three years before stated that "a man was like the beast; had nothing to do after death: and that after that period there would be nothing more of him."

The character of such evidence as this is very questionable in any event. The statements may have been made under circumstances of peculiar provocation, as in McFadden *vs.* Com., where after a long tiresome dispute a juryman made some impious remarks. Any man of a not very reverent nature is apt sometimes to make unthinking remarks which when repeated from memory by a hearer may disqualify him as a witness. As was remarked in Easterday *vs.* Kilborn, "You take a man's loose declarations and introduce them against him, without assurance that those who give them do not think as he does, and then adjudge that he is incompetent to testify, although you believe he will tell the truth, and would confide in him as soon as in any man" (Wright, 345).

Moreover is not such evidence irrelevant? What is the question at issue? It is whether the proposed witness *now*, at this moment believes in the existence of a god who will punish him if he violates his oath. Whether, should he be admitted *now* as a witness he could feel the influence of the religious sanction. The question is not whether he made impious and blasphemous remarks at some time in the past nor whether in fact he was at one time a pronounced atheist. The inquiry must be confined to the present state of his mind. The fact that the person under examination was an avowed atheist a year or two ago is little or no evidence that he is now. It depends upon the assumption of consistency. "With consistency a great soul has simply nothing to do. * * * Speak what you think now in hard words and to-morrow speak what to-morrow thinks in hard words again, though it contradict everything you said to-day" (Emerson, Essay on Self-Reliance). Even if the previous

declarations were made very soon before the trial this would prove nothing. There is no reason why one's belief may not be changed in the twinkling of an eye by the observation of some fact never before noticed or perhaps by giving serious thought to the matter for the first time.

Whether the testimony of other persons as to what the proposed witness has said in the past be relevant or not it is a very low grade of evidence indeed and cannot stand against the positive declarations of the witness himself, which constitute after all the only direct evidence of the state of his mind that it is possible to get. It has, therefore, come to be recognized that the proper way to ascertain the witness' belief is to interrogate him on his *voir dire*. If he avow his unbelief he is to be excluded; if he deny it, he must be admitted even though there may be extrinsic evidence tending to show unbelief in the past (McFadden *vs.* Com., 23 Pa., 12; Cubbison *vs.* McCreary, 2 W. & S., 262).

Inasmuch as the only feasible way of ascertaining one's religious principles is through his own declarations, the absurdity and uselessness of the rule excluding atheists and unbelievers becomes clearly apparent. What is the reason for the exclusion? Not because a man has made an impious avowal; not because he is an atheist, but because we assume he will not speak the truth. But since we must depend upon his own candor to enable us to exclude him on this ground—therefore we deny him the right to testify, because we believe him, when he says he is an atheist.

Bentham in his own forceful, half humorous style thus puts it "Next let the answer be, yes, I am an atheist. Then indeed, the man must be an atheist; at any rate he must be taken for an atheist. But shall this answer be regarded as a piece of evidence warranting the exclusion? No, surely, and for this reason. The answer is either false or true. If false, the supposed cause of the exclusion fails in point of fact. He is not an atheist; he cannot therefore with propriety be excluded on the ground of atheism. If the answer be true,

the cause of exclusion falls to the ground; the presumption of mendacity, the presumption grounded on the atheism, is proved to be erroneous (Bentham's Judicial Evidence, Vol. V, p. 129).

It requires a man of more than usual frankness and regard for the truth to avow such sentiments upon such an occasion. If he does avow them the consequences are severe. He subjects himself certainly to criticism if not to infamy as was once thought; he makes it impossible for himself to be a witness, in a case in which perhaps he desires to testify. The presumption of mendacity is not only completely destroyed but is supplanted by another, the strongest kind of presumption, that the witness will adhere strictly to the truth. He may indeed be lacking the religious sanction, but he has shown that the other inducements to truth telling are present in him to an extraordinary degree. How palpably inconsistent to exclude such a man and to admit a debased criminal who declares, whether true or false, that he believes in a god!

But the rule fails to do what it purports to do, viz: exclude unbelievers. Whom does it exclude? Some unbelievers, yes. Those who are unworthy of belief, no. Those unbelievers, who declare they believe, are admitted, while those who declare their real sentiments are excluded. In short, the abandoned lying atheist is a good witness, but the conscientious, frank one, never! Let us assume that the common law presumption is a true one, viz: that the atheist will never tell the truth, but goes about seeking to deceive all persons on all occasions. Suppose such an one is interrogated on his *voir dire*. How easy to say he believes, thus escaping all the infamy of an impious avowal and rendering himself competent to impose his lying evidence upon court and jury! The supposed security therefore in fact does not exist.

The same considerations should make it impossible to introduce evidence concerning religious belief for the pur-

pose of attacking the credibility of a witness. One's belief or unbelief, which are not matters of will or motive, ought to have no connection with or effect upon any civil right or capacity whatsoever. The existence of the common law rule is a survival of the intolerance of the time of Lord Coke, for it is based upon the assumption that christians only are to be fully trusted to follow the dictates of honor; that non-christians and unbelievers are perpetually under the ban of suspicion for opinions which they hold and perhaps cannot change. It should be abolished by statutory or constitutional provisions permanently prohibiting any inquiry into one's religious belief upon any pretense whatever and establishing at last entire freedom of conscience.

Irrespective, however, of the rules concerning the admission or exclusion of atheists, the oath is still required of most witnesses in modern judicial proceedings. Having grown up with the common law, as we have seen, it still seems firmly imbedded in our legal procedure. Whether it is a living plant or one from which life has long since departed, so that it may be safely rooted up and thrown upon the rubbish heap of old and useless customs is the last topic which will be discussed. Omitting all reference to superstitious practices among the ancients, a very material idea of the functions of the deity was entertained by practically everybody at the time when the common law was slowly rounding into form. Trial by the ordeal and trial by battle both so common in England at one time, depended upon the belief, that God at human summons would interfere in a particular case and suspend natural laws for the purpose of pointing out guilt or innocence. (See Bigelow, Hist. of Proc. in Eng., 322: Stephen Hist. of Crim. Law in Eng., p. 73, says, "They were appeals to God to work a miracle in attestation of the innocence of the accused persons"; Bracton, Vol. II, p. 441.) The efficacy of oaths both as a mode of proof and as administered to witnesses was grounded upon an assumption that God's vengeance would follow the breach of them, by reason

of the human ceremony. Both the ordeal and the oath depended upon precisely the same idea of the interference of God to assist the procedure of the courts.

As there was implicit faith in the result of the trial by the ordeal so there was in the efficacy of the oath. God's vengeance would surely follow perjury, hence no man would dare to lie under oath (Puffendorf, p. 334). So firmly fixed was the idea that no false testimony would be given by a sworn witness that a claim or defence might be proven merely by the oath of a party, supported by others who swore that they believed him, and so sure were the ancient lawyers that God's punishment would follow the crime of perjury that it was not punished by temporal power at all: this, it was thought, would be interfering with the functions of the deity (2 Pollock *vs.* Maitland, p. 541, citing Brunner D. R. G. ii, 681; Kovalevsky, Droit, coutemier Ossetien, p. 324).

The essential thought to be noticed both in the trials mentioned and in the use of oaths, was that it was the human ceremony which drew down the attention and action of the deity. Where God was invoked to point out guilt he would do so and not otherwise. He would inflict punishment for perjury not because lying is sinful but because he had been invoked as a witness to a lie. The witness was not actuated by fear of God's punishment for telling an untruth but by fear of his vengeance for violating an oath. It was not the essential wrong but the ceremony which afforded the security.

Modern thinkers have torn the veil from these superstitious ideas. The belief that God will interfere to rescue an innocent accused person from a physical predicament disappeared long ago. The ideas as to the efficacy of the oath have been very greatly changed. Temporal punishment for perjury was an admission that there was doubt about the perjurer getting his deserts from a superhuman power. The idea that one will not dare to lie under oath is so completely obliterated that one method of impeaching the credit of a

witness is to bring in other witnesses who swear they would not believe him on his oath—a complete reversal of trial by wager of law.

With the decline of belief in the efficacy of the oath there was a corresponding decline of belief in its necessity. At common law some form of swearing by which the witness made an appeal to God was absolutely imperative. No one could be permitted to testify until he had taken an oath (1 Phil on Ev., 15; Omychund *vs.* Barker, 1 Atkin, 21; Lord Shaftsbury *vs.* Lord Digby, 3 Keb., 631, 2 Roll. Abr., 686; Rex *vs.* Sutton, 4 M. & S., 532 [note at p. 537]). When the members of the Society of Friends first refused to be sworn there was no thought of admitting their testimony in courts of justice. What security was there that they would speak the truth? They would neither kiss the book, nor raise the right hand and invoke divine vengeance, nor touch the toe of a priest, nor hold the tail of a cow, as did the Hindoos, nor crack a saucer, like the Chinamen, nor perform any other ceremony, it was quite clear that their evidence could not be heard. A mere solemn affirmation that their "yea" should be "yea" and their "nay," "nay," was as nothing in comparison with the sanction afforded by these rites.

It is a matter of history that Friends and other sects suffered persecution for many years by reason of their conscientious scruples against taking an oath or in any way subscribing to a ceremony which involved a reference to the deity, and were of course denied the right to be heard in courts of justice.

Finally, however, there came a change of heart. Perhaps the incongruity of receiving the evidence of a mendacious Hindoo swinging the tail of a cow in his hand or of a Chinaman burning a joss stick or cracking a saucer and invariably grinning as he did it, and refusing to hear that of the plain, simple, straight-forward Quaker, finally forced itself upon the prejudiced minds of the British legislators. Hence in the reign of William and Mary we have various

acts of Parliament "for the relief of the people commonly called Quakers." The first one of the kind passed in 1688 allowed the Friends to substitute a declaration of fidelity for the oath of allegiance, beginning with these words, "I, A. B., do sincerely promise and solemnly declare before God and the world, etc." (1 William & Mary, c. 18).

Eight years later, in 1696, the idea that only those who had sworn were fit to be believed, was definitely overthrown by an act allowing the "Quakers" to testify on affirmation in certain cases, in this wise, "I, A. B., do declare in the presence of Almighty God, the Witness of the truth of what I say, etc. (7 and 8, Wm. & Mary, C. 34, made perpetual by 1 Geo. 1, Stat. 2, C. 6). Bentham says this exception in favor of Quakers was made because they, of all the people in England, were recognized to be the most truthful. It indicated a tremendous change in public sentiment. It was an abandonment of all previous ideas on the subject to allow any person to give evidence without having first called down upon himself the wrath of God if he spoke falsely. The members of the Society of Friends were not pleased with the form of declaration, as they objected to subscribing to any ceremonial involving that which they believed to be a profane and impious reference to the deity. Parliament therefore again intervened for them in 1721, and prescribed the form of affirmation now in general use, viz: "I, A. B., do solemnly, sincerely and truly declare and affirm," etc. (8 Geo. 1, C. 6). These provisions were afterwards extended to Moravians and Separatists and those who had once been members of these sects, and finally to all persons of any denomination who state that they have conscientious scruples against swearing. When the law was changed so as to admit atheists and unbelievers it was provided that their testimony also should be received on affirmation (17 and 18 Vict., C. 125, Section 20; 51 and 52 Vict., C. 46). The same law in all particulars has been extended to India ("Indian Oaths Act," Anglo-Indian Codes, Vol. II, Appendix, p. 937), and

in Canada all who have conscientious scruples may affirm (Can. Ev. Act of 1893, Section 23).

When the first settlers came to America from England, they, of course, brought with them the English law as to oaths. The only colony which would be at all likely to attempt an innovation at that time was the Quaker province of Pennsylvania. Accordingly in the laws agreed upon in England in 1682, by William Penn and those who had associated themselves with him for the purpose of founding the new colony, we find one which provides that testimony shall be given in the courts upon simple affirmation without oath as follows: "All witnesses, coming or called to testify their knowledge in or to any matter or thing in court, or before any lawful authority within the said province, shall there give or deliver in their evidence or testimony, by solemnly promising to speak the truth, the whole truth, and nothing but the truth, to the matter or thing in question. And in case any person so called to evidence shall be convicted of wilful falsehood, such person shall suffer and undergo such damage or penalty, as the person or persons against whom he or she bore false witness, did or should undergo; and shall also make satisfaction to the party wronged, and be publicly exposed as a false witness, never to be credited in any court, or before any magistrate, in the said province." This law was far in advance of any English law of that day and indeed of this day, and was consequently soon interfered with by the English Government and was repealed by its action in 1693. (See Sharpless "A History of Quaker Government in Pennsylvania," Vol. I, Chap. V.) The Act of 1696, however, which extended to Quakers the privilege of testifying on affirmation was made applicable to the American colonies so that members of that society, except during a short period in Pennsylvania, were never subjected to persecution in America for refusing to swear.

At the present time any person having religious scruples

against swearing may affirm in every state or territory of the United States except North Carolina in which only Quakers, Dunkers and Menonites are allowed such privileges. In nine of these states the affirmation may be taken by any person at his option, irrespective of scruples against the oath. All states which admit unbelievers allow them to testify upon affirmation.

What is the true significance of this legislation? The testimony of a very large class of people, some of whom are devoid of any religious belief, is admitted unsworn. Although some text writers have said that the affirmation is in effect an oath, yet this must be taken to mean merely that those who affirm do so under the pains and penalties of perjury. There is no appeal to God—no imprecation either expressly or impliedly of his vengeance—merely a solemn declaration that the witness will speak the truth. Therefore the supposed added obligation by the religious ceremony is wholly lacking. And yet does any person ever seek to question this testimony because it is unsworn? On the contrary no distinction is or can be made between that which is sworn and that which is unsworn but is received on affirmation only.

In Great Britain and her colonies and in all the American states evidence received on oath and that received on affirmation (if given by those having scruples against swearing) is accorded equal weight. And in nine American states sworn evidence and affirmation evidence (irrespective of scruples) is received without question and upon the same footing. Practically the latter rule is almost universally true, *i. e.,* it is customary for the court crier to administer the affirmation without any interference either by court or attorneys upon a simple request by the witness: and when a number are to be sworn or affirmed at the same time the crier of his own motion separates them into two divisions, those who swear and those who affirm, and administers oath or affirmation accordingly.

These facts clearly show that in the estimation of those

to be affected by the evidence there is no distinction between the solemnity of the two ceremonials. What is the conclusion? That the idea of an added obligation imposed upon the witness by an appeal to God has vanished—that no intelligent persons any longer believe that God stands ready in the guise of a "sheriff's officer," as Bentham puts it, to devise and inflict a special punishment upon a man for the violation of a ceremonial—that it is no longer thought to be of the slightest importance whether the witness swears or affirms.

It seems, therefore, that modern legislators, judges and attorneys think of the oath as a mere form to be gone through with by the witness, for the purpose of notifying him that from the moment he subscribes to it his words become of great importance, because they are spoken upon a judicial occasion—that he is expected to tell the truth without equivocation or concealment—that should he fail to do so his words will probably be shown to be false by cross-examination and that in case of detection, punishment for perjury awaits him. A promise is also exacted from the witness, to which, if he be an honorable man and particularly if he has religious convictions, he will strictly adhere. All this the affirmation accomplishes. Then why retain the oath, a religious ceremonial which appears to have become but an idle form?

The proposition to abolish the use of the oath altogether is not a new one. Aside from the influence of religious people who do not believe in swearing, many legal minds have for more than one hundred years conceived that this ceremony has outlived its usefulness. Bentham writing early in the nineteenth century says that it is utterly useless. He adds, however, that if used at all it should be made effective and makes various suggestions tending to that end. Thus he says *inter alia* that it would be well to emphasize the terror of religious punishment by having upon the wall of the court room a copy of Raphael's painting of the death

of Ananias and Sapphira. He also suggests that the penalty for perjury be inscribed in raised letters before the witness and a graphic portrayal of a convict suffering the usual punishment for the same offence be exhibited to him by suddenly drawing up a curtain, to which a court officer shall at the proper moment (presumably as the witness is about to tell a lie) call his attention by the motion of a wand. (See I Bentham on Ev., p. 399.)

Bentham's sentiments as to the value of oaths have been approved by many later authors whom I have not time to quote. One very recent writer, however, Sir Herbert Stephen, Bart., referring to oaths in criminal cases, says, "Some people seem to have a notion that a statement made on oath has an almost mechanical advantage in credibility over one which is not so made. I am not sure whether this belief is founded upon the theory that the moral difficulty of telling a lie when you have sworn to tell the truth is necessarily and invariably greater than the moral difficulty of telling a lie when you have not so sworn or whether the idea is that the fact of being on oath gives to the matter deposed a supernatural tendency towards accuracy, independently of the deponent's volition. In either case I am perfectly satisfied that this view is wholly and absolutely chimerical. * * * To imagine that any prisoner who would assert his innocence without oath would hesitate to swear to it, appears to me babyish. No doubt there have been in the world's testimony, and are now, many persons willing to lie, but afraid to lie in some form of peculiar sanctity. *No human being in England* is willing to lie in a court of justice, yet afraid to do so because he has kissed a book after listening to a well-known formula. Witnesses are constantly heard in the criminal courts telling gross and unquestionable lies. They do so, if at all, as a rule, with the most entire willingness, and if any caution makes them hesitate (which is not often) it is being reminded not that they are upon oath, but

that they are liable to prosecution for perjury. ("Prisoners on Oath," p. 21.)

Before proceeding further it should be observed that should the oath be abolished this would in no sense destroy the solemnity of the proceeding. The only change would be in administering on all occasions the same ceremonial which is now administered theoretically in some and practically in all the states at the option of the witness. The argument in favor of or against the continued retention of the oath must be directed solely to the one element of the appeal to God because all other elements are retained by the affirmation.

What is the argument in its favor? It will be found to rest entirely upon the assumption that there is a large class of persons who through ignorance or superstition still believe that there is some frightful fate reserved expressly for those who violate an oath. This argument depends for its validity upon the further assumption that this class, if it exists, is compellable to so testify under oath, and hence can be frightened into truth telling. It is very doubtful whether either assumption be true. Suppose we have an individual who has been called as a witness upon a judicial occasion. If he tells the truth, injury will result to him. He desires to lie. He weighs the chance of detection and punishment and decides to take the risk. If he is religious he knows lying is sinful; he decides also that he will risk punishment by divine justice. Now, is it probable, that he will by virtue of having taken an oath which, as usually administered, is of little or no solemnity, relinquish his previous purposes and speak the truth? It is barely possible, although surely the probabilities are extremely remote. Edward A. Thomas says in the *North American Review:*

"It appears difficult at the present day to conceive the character of a person who, neither fearing the penal enactments of men against false witnesses, nor the denunciations of God against

liars; a person who would not hesitate to rob his neighbor of all his possessions by means of false testimony, nor to send him to the penitentiary or the gallows by the same instrumentality; yet who, in opposition to his own interest, would be restrained from the commission of all these enormities solely by the sanctity of an oath and the fear of the additional punishment in the future world. He might reason with himself that men, unable to prove his guilt, would not punish him; but that an omniscient God certainly would. Could not God as readily perceive and punish the sin of making a false statement, by which an innocent man would be defrauded, imprisoned, or judicially murdered? If any man does exist with the character just described, he must closely resemble that robber mentioned by Irving, who had no scruples whatever about cutting the throats of several of his fellow-beings before breakfast for a small sum of gold; but was thrown into an agony of remorse when he learned that he had been eating a piece of meat upon a fast day" (Article in *N. A. Rev.* for September, 1882).

But what about the second assumption? Can we require this man to take the oath and thus frighten the truth out of him by the fear of divine vengeance? Not at all. He does not have to take the oath. In nine states he will express his preference to affirm; no questions can be asked; it is his right, although the reason he prefers to affirm may be that he desires to lie, unsworn. In the remainder of the states and territories and in England he will in all human probability also be allowed to affirm without question. But suppose he is challenged. Suppose he is asked "Why do you wish to affirm?" He replies "I have conscientious scruples against swearing." This is a lie, but he has already made up his mind to lie when not bound by the tie of the oath. What therefore becomes of the security afforded by the oath? Nothing can be clearer than that it is utterly dissipated.

With the most liberal assumption as to its efficacy the oath seems useless. Since it has become such an integral part of our system of procedure, however, it may be the part of prudence to retain it. This is the position assumed by many who agree that logically its present use is an absurdity, but who declare that they *feel* its power in the courts. They

say they can see its deterrent influence upon witnesses, who, if questioned, could not tell themselves, why they are affected by it. There is a widespread belief among members of the bar that to admit all testimony unsworn would be a dangerous experiment and would materially increase perjury.

This feeling is perhaps nothing more than the sentiment always encountered when a change in existing institutions is proposed. It is a little hard to understand why a lawyer who will not even take pains to see whether his jurors or witnesses take oath or affirmation, should profess so great an apprehension when it is proposed to allow all alike to be affirmed. It is a striking reminder of the early days of Pennsylvania when there was a great outcry of horror in England because two British citizens had been condemned to death by Quaker juries, the members of which were unsworn. (See Sharpless's History of a Quaker Experiment in Government, Vol. I, p. 149.)

However, before deciding that we should bow before a "feeling" which cannot be justified by logical reasons, it is but just that the positive arguments against the use of the oath shall be considered.

The first is that if effective at all the oath is avowedly but an imposition upon the ignorance or superstition of the witness. No intelligent man at this day pretends to believe that it is any greater sin to tell an untruth upon oath than upon affirmation—it is the lie not the violation of the ceremony that is wicked. Assuming that there are some ignorant persons who believe in the oath and also in other witch's tales, long since become the laughing stock of the world, the administration of justice ought not to be rested upon such a foundation.

Another objection to the oath as now used is the discrimination made by requiring certain people to swear while others are permitted to affirm. Even in the Roman times a proposition to require one to swear to a promise was deemed a reflection upon his integrity. Shakespeare makes

Brutus speak as follows, in Julius Cæsar, (Act II, Sc. I) just as the conspirators are separating:

"Bru. Give me your hands all over, one by one,
Cas. And let us swear our resolution.
Bru. No, not an oath; if not the face of men,
The sufferance of our souls, the time's abuse,—
If these be motives weak, break off betimes,
And every man hence to his idle bed;
So let high-sighted tyranny range on,
Till each man drop by lottery. But, if these,
As I am sure they do, bear fire enough
To kindle cowards and to steel with valour
The melting spirits of women, then, countrymen,
What need we any spur but our own cause,
To prick us to redress? what other bond
Than secret Romans, that have spoke the word,
And will not palter? and what other oath
Than honesty to honesty engaged,
That this shall be, or we will fall for it?
Swear priests and cowards and men cautelous,
Old feeble carrions and such suffering souls
That welcome wrongs; unto bad causes swear
Such creatures as men doubt; but do not stain
The even virtue of our enterprise,
Nor the insuppressive mettle of our spirits,
To think, that or our cause, or our performance
Did need an oath; when every drop of blood
That every Roman bears, and nobly bears,
Is guilty of a several bastardy,
If he do break the smallest particle
Of any promise that hath pass'd from him."

Another objection is the profanity of the oath. Even if it were administered in a reverent and solemn manner it would still be shocking to the religious feelings of a large portion of the community. This is amply demonstrated by the fact that provision is made in all English speaking countries for those who have religious scruples against swearing. Irrespective of the grounds of this belief that swearing is sinful, the fact that it is possessed by a very large and emi-

nently respectable portion of the community should be entitled to great weight. In some parts of Pennsylvania largely inhabited by members of the Society of Friends and their descendants, the affirmation is much more frequent than the oath, and one who swears is looked upon as of almost doubtful character. But the oath is not administered in a solemn and reverent manner—on the contrary it is administered on practically all occasions in a very light and irreverent manner. Even if one subscribes to the doctrine of the English church that swearing before magistrates is not forbidden by the Scriptures, and, therefore, has no scruples against it, yet such continual reference to the most sacred name surely can be thought of as little better than "vain and false swearing."

There is a final objection against the use of oaths which does not depend upon purely ethical considerations. There is a large class of persons who not only have conscientious scruples against swearing but also against administering oaths. This is particularly true of the Society of Friends. As a matter of fact Friends who maintain their standing in their society are to-day excluded from holding the offices of judge, magistrate, or any other office as a part of the duties of which they may be called upon to administer oaths. This is not true religious liberty. This is not consistent with the spirit of the constitution. If persons having conscientious scruples against administering oaths are capable of filling such offices creditably (and there can be no doubt of this) they and the community are both injured by a rule or custom which prevents them from becoming candidates. If William Penn the great founder of Pennsylvania were alive to-day he would be debarred from the office of judge or magistrate. The time surely has come when affairs secular and affairs religious should be separated finally. When the duties of civil office should be definitely severed from all questions which can affect the religious belief of a possible incumbent.

Legislation having for its purpose the abolition or modification of oaths has already been enacted in some States and countries. In Mexico the law is "The simple promise to tell the truth * * * shall be substituted for the religious oath in its effects and penalties." (Hall's Mex. Law, p. 1201.) In Maryland the oath has practically been abolished, as the present form omits all imprecatory words. (Pub. Stats. Art. I, Sec. 8.) In California all reference to the deity was abolished in their form of oath by a very recent act (Code Sec. 2094), although the code revision was declared unconstitutional for reasons which had nothing to do with the subject matter (134 Cal., 291).

The ideas of the great founder of Pennsylvania have been tested by time. Most of them although in his day deemed chimerical, have become a part of our every day experience. It was largely due to the beneficent influence of his wise and far-seeing statesmanship that Pennsylvania became the freest and most prosperous of the colonies—it laid the foundation of her power to take the lead in the momentous affairs of the nation as she has done. But the almost complete religious liberty which William Penn brought her, Pennsylvania lost through the interference of the churchmen of England and she has never fully regained it. If she will abolish the religious tests entirely, substituting in all cases the solemn affirmation for the oath, she will but restore the law as William Penn made it, and again prove her title to be, as to her measure of religious freedom, preeminent among the states.

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Paper read Tuesday evening, June 30, 1903, before the Pennsylvania Bar Association.